Waste Management of Palm Beach *and* Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL–CIO. Case 12–CA–19010

September 22, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On July 13, 1998, Administrative Law Judge Lawrence W. Cullen issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

1. We do not agree with the judge's finding that the Respondent violated the Act by hosting a dinner party.

On October 14, 1997, 3 days prior to the union election, the Respondent sponsored and hosted a "benefits dinner" at a local hotel. About 100 employees attended. Management representatives gave a presentation on employee benefits. As part of this presentation, the Respondent announced that as of January 1, 1998, there would be a corporatewide increase in its matching contribution to the 401(k) plan. The judge citing *Peaker Run Coal Co.*, 228 NLRB 93 (1977), found that it is an independent violation of Section 8(a)(1) for an employer to host a social function at which 8(a)(1) violations are committed.

The judge's conclusion regarding the dinner party is contrary to Board precedent consistently holding that providing meals to employees or holding cocktail parties or dinners is a legitimate campaign device and is not coercive. *L. M. Berry & Co.,* 266 NLRB 47, 51 (1983); *Northern States Beef,* 226 NLRB 365, 376 (1976). Accordingly, we reverse the judge's finding that the holding of the dinner party was an independent violation of Section 8(a)(1).[2]

2. We agree with the judge's finding that the Respondent violated the Act by announcing at the dinner party that as of January 1, 1998, there would be a corporatewide increase in its matching contribution to the 401(k) plan. In doing so, we emphasize the critical question of the timing of the announcement with respect to the election.

There is no dispute that the benefit was to be granted corporatewide. However, the record discloses that the Respondent had no plans to announce companywide the enhanced benefit on October 14, 1997. Further, the Respondent does not contend that employees other than Palm Beach employees learned of the enhanced benefit before October 17, 1997. Finally, the Respondent offers no explanation for why it needed to inform the Palm Beach employees about this important benefit earlier than it informed other employees and just 3 days before the election.

The Board has held that benefits granted during an election campaign are not unlawful if the employer shows that its action was governed by factors other than the pending election. The employer can meet its burden by showing the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the union. *American Sunroof Corp.*, 248 NLRB 748, 748–749 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). But, an employer cannot time the announcement of increased benefits to employees in order to dissuade their union support. *Reno Hilton*, 319 NLRB 1154, 1154–1155 (1995); *Capitol EMI Music*, 311 NLRB 997, 1012 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

It may be true that the plan to provide the enhanced benefit was conceived before the election campaign and was to cover all the Respondent's employees, not just the Palm Beach employees. But, this does not satisfy the Respondent's burden to show the announcement would have been made at the same time even if there had been no union activity.[3] In *American Sunroof Corp.*, supra, the Board determined that employees at all the respondent's facilities, including the facility where an election was scheduled, would have received notice of a new benefit when they did even if there had been no union activity. In the instant case, the record shows that the Respondent had no plans to make a companywide an-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We believe that the better reading of the case on which the judge relied is that the Board found a violation for conduct that occurred during the hosting of a social function, not a finding of an independent violation for hosting a social function. In any event, there is no rationale in that case for finding an independent violation for hosting a social function, and, as mentioned above, such a finding is contrary to otherwise consistent Board precedent.

[3] Contrary to our dissenting colleague's position, it is not determinative that the decision to provide the enhanced benefit may have been made prior to the filing of the petition; under Board and court precedent the Respondent must also show that its announcement of the enhanced benefit "would have been forthcoming at the time made even if there were no union campaign." *Arrow Elastic Corp.*, 230 NLRB 110, 113 (1977), enfd. 573 F.2d 702, 705–706 (1st Cir. 1978). Like the Respondent, our dissenting colleague is unable to satisfactorily explain why the announcement of the companywide benefit was made only to the Palm Beach employees and just 3 days before the election.

nouncement on October 14, 1997, and did not do so. On the contrary, the Respondent made an announcement only to the Palm Beach employees.[4]

On this record, we conclude, in agreement with the judge, that the Respondent accelerated the announcement in order to discourage union support. Therefore, we find that the announcement violated Section 8(a)(1) of the Act. *Brooks Bros.*, 261 NLRB 876, 883 (1982), enfd. 714 F.2d 111 (2d Cir.); *H-P Stores, Inc.*, 197 NLRB 361 (1972).

3. The judge found, and we agree, that at meetings conducted by the Respondent during the organizing campaign, the Respondent unlawfully solicited employee grievances and impliedly promised to remedy them. Our dissenting colleague does not take issue with these unfair labor practice findings.

When the Respondent asked employees at the meetings to identify their concerns, employees complained, inter alia, about the policy that the Respondent maintained at the Palm Beach location (but not at other facilities) of imposing monetary penalties on drivers involved in on-the-job traffic accidents. Company officials replied that the policy was wrong and promised to refund the penalties. The penalties, amounting to at least $200 each, were, in fact, refunded a few days before the election.

The judge found that the Respondent violated Section 8(a)(1) by promising to refund the penalties and violated Section 8(a)(3) by the actual refunding of the penalties. Contrary to our dissenting colleague, we agree with the judge.

In determining whether a grant of benefits is unlawful, see *Lampi, L.L.C.*, 322 NLRB 502 (1996):

> [T]he Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits.

Applying this standard here, it is clear that prior to the union campaign, the Respondent maintained a policy of penalizing Palm Beach employees for on-the-job accidents. During the critical period, the Respondent announced a change in that policy and refunded the penalties previously collected from the Palm Beach employees. Therefore, under the above-cited precedent, the Respondent must establish that the timing of the announcement and the grant of this benefit was unrelated to the election. Although the Respondent argues that it "acted exactly as [it] would if there had been no union activity" and that "it did not attempt to use its actions to gain favor for the Company," the record does not support these contentions. Thus, the record reflects that the Respondent never attempted to remedy this problem before the Union's campaign. The record also shows that the promise to refund the penalties was made at antiunion meetings and in the context of other unlawful promises of benefits. Accordingly, we find that the Respondent failed to show that the timing of the announcement and grant of benefit was governed by factors other than the pending election, and we affirm the judge's unfair labor practice findings.

4. We agree with the judge's finding that the Respondent unlawfully promulgated and maintained and unlawfully threatened to enforce by removal from the property an invalid no-solicitation/no-distribution rule.

On August 28, 1997, prior to 6 a.m. and the beginning of the morning shift, employee Croswell Gayle solicited signatures and distributed union literature in the parking lot at the Respondent's facility. Supervisor Glen Mincey told him that if he was serious about forming a union he should take it outside the perimeter of the compound. Mincey also told Gayle that employees were not allowed to engage in union activities within the Respondent's facility.

On August 29, 1997, Gayle and employee Walt Williams distributed union literature to employees in the parking lot prior to working hours. Gayle testified that Operations Manager David Hesp told them, "[C]ome on guys, you can't do this kind of thing out here. Then he said we can't hand out literature in the working area." When Gayle replied that their union representative said they were permitted to distribute in nonworking areas such as the parking lot, Hesp left. The transcript continues:

> GAYLE: [T]hen he came back . . . and apologized and said that . . . we can go ahead and hand out literature . . . but we cannot do it come Monday morning.
>
> JUDGE CULLEN: You cannot do it come Monday morning?
>
> THE WITNESS: Right.
>
> . . . .
>
> JUDGE CULLEN: . . . In other words, he was going to let you continue to do it that day, but next Monday you couldn't do it on the parking lot?
>
> THE WITNESS: Right.
>
> JUDGE CULLEN: All right.
>
> THE WITNESS: There's one thing that I left out. Mr. Hesp also said that if we continued to do this, he'd have us escorted off the property.

[4] See also *Speco Corp.*, 298 NLRB 439, 443 (1990):

> [I]t is clear that an employer's right to recite for employees the benefits bestowed upon them prior to the union's appearance includes the right to announce the culmination of any nonunion related efforts to improve those benefits when such efforts come naturally to term, even in the period of an organizing campaign. The announcement becomes perilous, however, when the employer has, and exercises, discretion in choosing the time for announcement; timing may not be manipulated to heighten the impact of a new benefit, a subject to which employees are keenly sensitive.

Board precedent holds that employees may solicit on plant premises subject only to the restriction that the soliciting occur during nonworking time and that employees may distribute literature in nonworking areas of the plant premises during nonworking time. *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 621 (1962). The soliciting and distributing of literature at issue in this case occurred during nonworking time in a nonworking area. Clearly, the Respondent's prohibitions of soliciting and distributing of literature in the parking lot were not valid. Further, the Respondent does not claim that it had a no-solicitation/no-distribution rule before the incidents in the parking lot.[5] Thus, it appears that invoking a rule against soliciting and distributing literature was in response to the union organizing. Promulgating, maintaining, and threatening to enforce its rule under such circumstances is unlawful. *Mini-Togs*, 304 NLRB 644, 651 (1991), enfd. 980 F.2d 1027 (5th Cir. 1993).

The Respondent argues that the two incidents were inconsequential and did not impact on any employee, that Hesp's statement prohibiting distribution in the parking lot was revoked, and that Hesp's threat to remove the employees if they returned on Monday was simply a reminder that employees should not be on company property on Labor Day.

We reject the Respondent's argument that Hesp retracted his prohibition and simply advised the employees that the plant was closed on Labor Day. The credited statement was that Hesp told the employees they could continue distributing on August 29, 1997, but they could not "do it come Monday morning . . . [and] if [they] continued . . . [Hesp would] have [them] escorted off the property." This is not a statement of advice, it is a prohibition followed immediately by a threat to remove them from the property if they continued soliciting in the future.

The Respondent claims that the "escort[ing] off the property" statement was not a threat, but rather a reminder that employees were not allowed on the premises on holidays. We reject this contention. The Respondent put on no evidence of a policy or practice regarding employee access to the plant on holidays. Without some evidence to this effect, we cannot find that the statement attributed to Hesp was limited in the way in which the Respondent argues.

We also reject the Respondent's arguments that these incidents were inconsequential and had no impact on any employees. The Respondent on two occasions deliberately attempted to prohibit lawful soliciting and distribution activity and on one occasion threatened two employees with removal from the plant premises for engaging in this activity. Further, given the nature of the activity in question, it is likely that other employees were present when Hesp sought to prohibit the activity.

[5] Indeed, the unrebutted testimony was that the Respondent permitted other forms of solicitation on plant premises.

Even assuming, however, the Respondent's statement of the facts to be true and that Hesp's conduct was directed only at Gayle and observed by no other employees, we would not agree with the Respondent that Hesp's statements had no impact on Gayle because his protected activity continued. The test is not whether Hesp's conduct succeeded or failed, but whether the conduct reasonably tends to interfere with the free exercise of Section 7 rights. *Florida Steel Corp*., 224 NLRB 45 (1976).

Accordingly, we adopt the judge's finding that the Respondent unlawfully promulgated and maintained an invalid no-solicitation/no-distribution rule. We further adopt his finding that the Respondent unlawfully attempted to enforce its invalid rule by threatening to remove employees from the premises if they continued their union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Waste Management of Palm Beach, Boynton Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Promulgating, maintaining, and enforcing a rule prohibiting employees from making union-related solicitations and distributions at its facility."

2. Substitute the following for paragraph 1(f).

"(f) Informing its employees of an enhancement in benefits in the 401(k) plan in order to persuade them to reject the Union as their bargaining representative."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

My colleagues find, inter alia, that the Respondent violated the Act by announcing to employees two matters: (1) a corporatewide increase in matching contributions to the Respondent's 401(k) plan; (2) a promise to refund and an actual refund of monetary penalties that were imposed on employees for on-the-job traffic accidents. I disagree that these actions were unlawful.

With regard to the announcement of the 401(k) benefit, it is not disputed that in July 1997, i.e., about 2 months before the election petition was filed, the Respondent decided to enhance its corporatewide 401(k) plan, effective January 1, 1998. At a benefits dinner held on October 14, 1997, 3 days before the election, the Respondent announced the 401(k) enhancement to the employees in attendance.

In my view, the decision and grant of the benefit occurred in July 1997 before the petition was filed. I recognize that the 401(k) fund would not actually receive the increase until January 1, 1998. However, this does not contradict the fact that the benefit became an established benefit of employment as of July 1997.

There is nothing unlawful about informing employees of extant benefits *that they have*. Indeed, the employees can make a more informed choice concerning representation if they know their current benefits when they vote in the election. My colleagues would keep the employees in the dark with respect to such benefits.

Arrow Elastic Corp., 230 NLRB 110, 113 (1977), enfd. 573 F.2d 702, 705–706 (1st Cir. 1978), cited by my colleagues is clearly distinguishable. In that case, an announcement of a pension benefit was made on May 4, 2 days prior to the election. At that time, the pension benefit had not yet been finalized. (That did not occur until September 10.) By contrast, in the instant case, the benefit had been finalized as of the date of the announcement. Thus, the Respondent was simply announcing an established benefit.

My colleagues' reliance on *Reno Hilton*, 319 NLRB 1154, 1154–1155 (1995); *Capital EMI Music*, 311 NLRB 997, 1012 (1993), enfd. 23 F.3d 399 (4th Cir. 1994); *Speco Corp*, 298 NLRB 439, 443 (1990), and *Brooks Bros.*, 261 NLRB 876, 883 (1982), enfd. 714 F.2d 111 (2d Cir. 1982), is misplaced. The conduct at issue in those cases involved the granting of benefits *in response to union activity*. By contrast, in the instant case, the benefit was corporatewide and was not in reaction to the petition at the facility involved herein. Indeed, as noted, the grant of benefit preceded that petition.

In addition, *H-P Stores, Inc*., 197 NLRB 361 (1972), also cited by my colleagues, is distinguishable. In that case, the "normal" date for announcing the benefit would have been July 1, the date on which the new plan was actually put into effect. The employer *withheld* the announcement for 13 days, for maximum effect on the election. By contrast, in the instant case, there was no "normal" date for an announcement, and the Employer *gave* the information to employees so that they would know what their benefits were prior to the election.

With regard to the Respondent's refund of monetary penalties, the record establishes that, at an employee meeting prior to the election, the Respondent learned for the first time that, in 1995, certain on-site supervisors had imposed monetary penalties on drivers involved in on-the-job traffic accidents. The penalties were contrary to the practice at the Respondent's other facilities, and were in violation of company policy. The Respondent told the employees that these penalties were improperly imposed, and shortly thereafter the Respondent refunded the employees the penalty money that had been improperly deducted from their paychecks.

From the foregoing facts, my colleagues find that the Respondent unlawfully promised a benefit to employees, and further violated Section 8(a)(3) by refunding the money. I disagree. The facts show that, upon learning of a departure from the Respondent's policy, the Respondent promptly took corrective action. Thus, this case does not involve a change in policy prior to the election.[1] Rather, the policy was set prior to the union campaign, and the Employer learned about a breach of that policy during the critical period. My colleagues say that the Employer is prohibited from taking corrective action if there exists union activity or an upcoming election. Contrary to my colleagues, I would not tie the hands of an employer and prohibit it from taking prompt corrective action for conduct that is violative of its preexisting corporate policies.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate, maintain, and enforce a rule prohibiting employees from making union-related solicitations and distributions at our facility, and WE WILL NOT threaten to remove employees from our facility for violating such rule.

WE WILL NOT interrogate employees regarding their union membership, activities, and sympathies and WE WILL NOT threaten employees with loss of benefits if they select Freight Drivers, Warehousemen and Helpers, Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL–CIO, or any other union as their collective-bargaining representative.

WE WILL NOT solicit employee complaints and grievances and impliedly promise employees increased benefits and improved terms and conditions of employment if they reject the Union as their bargaining representative.

WE WILL NOT promise employees a refund of monetary penalties paid for chargeable accidents if they reject the Union as their bargaining representative.

[1] I disagree with the majority's finding that the Respondent, at its Palm Beach facility, had a "policy" of imposing monetary penalties on drivers. To the contrary, the Respondent's clear corporate "policy" was not to impose such penalties. Thus, the respondent did not change its "policy" but rather corrected the departure from "policy" at Palm Beach.

WE WILL NOT inform employees of an enhancement in benefits in the 401(k) plan in order to persuade them to reject the Union as their bargaining representative.

WE WILL NOT grant employees refunds for monetary penalties paid for chargeable accidents in order to discourage their support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WASTE MANAGEMENT OF PALM BEACH

Susy Kucera, Esq., for the General Counsel.
Douglas Sullenberger, Esq., for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on June 15 and 16, 1998. I issued a bench decision on June 16, 1998, pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations on the entire record in this proceeding including my consideration of the arguments of counsel and the trial memorandums of the General Counsel and the Respondent. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A" the pertinent portion of the trial transcript (pp. 324–345) as corrected and modified.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) On or about August 28, 1997, by Glen Mincey, promulgating and since that date maintaining and enforcing a rule prohibiting employees from making union-related solicitations and distributions at its facility.

(b) On or about August 29, 1997, by David Hesp, threatening to remove its employees from its facility if they violated the aforesaid rule.

(c) On or about August 28, 1997, by Rick Boardman, at its facility, interrogating its employees regarding their union membership, activities, and sympathies and threatening them with loss of benefits if they selected the Union as their collective-bargaining representative.

(d) In or about September and October 1997, by W. Scott Green and Kenneth P. Peterson, at its facility, soliciting employee complaints and grievances and impliedly promising employees increased benefits and improved terms and conditions of employment if they rejected the Union as their bargaining representative.

(e) In or about September and October 1997, by W. Scott Green and Kenneth P. Peterson, at its facility, promising its employees a refund for monetary penalties paid by its employees for chargeable accidents if they rejected the Union as their collective-bargaining representative.

(f) Hosting a food and drink social function on or about October 13, 1997, and informing its employees of an enhancement in benefits in its 401(k) plan in order to persuade them to reject the Union in the upcoming election scheduled for October 17, 1997.

4. Respondent violated Section 8(a)(3) and (1) of the Act by granting certain of its employees a refund for monetary penalties paid by them for chargeable accidents to discourage their engagement in union activities.

5. The above-unfair labor practices, in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. Respondent did not otherwise violate the Act.

THE REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommend that the Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act and post the appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Waste Management of Palm Beach, Boynton Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule prohibiting employees from making union-related solicitations and distributions at its facility.

(b) Threatening to remove its employees from its facility if they violate the aforesaid rule.

(c) Interrogating its employees regarding their union membership, activities, and sympathies and threatening them with loss of benefits if they select the Union as their collective-bargaining representative.

(d) Soliciting employee complaints and grievances and impliedly promising employees increased benefits and improved terms and conditions of employment if they reject the Union as their bargaining representative.

(e) Promising its employees a refund for monetary penalties paid by them for chargeable accidents if they reject the Union as their bargaining representative.

(f) Hosting a food and drink social function and informing its employees of an enhancement in benefits in the 401(k) plan in order to persuade them to reject the Union as their bargaining representative.

(g) Granting employees a refund for monetary penalties paid by them for chargeable accidents to discourage their engagement in union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Palm Beach, Florida, copies of the attached notice marked "Appendix B."[2] Copies of the notice, on forms pro-

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

vided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 28, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. As to violations not specifically found, the complaint is dismissed.

APPENDIX A

BENCH DECISION

[Errors in the transcript have been noted and corrected.]

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JUDGE CULLEN: We'll be on the record.

All right. Ladies and gentlemen, I'm going to enter a Bench Decision in this case.

This case was heard before me in Miami, Florida on June 15th and 16th, 1998, pursuant to a Complaint filed by the Regional Director of Region 12 of the National Labor Relations Board, the Board, and is based on a third amended charge filed by the Freight Drivers, Warehousemen and Helpers Local Union Number 390, affiliated with the International Brotherhood of Teamsters, AFL–CIO, the Charging Party or the Union on February 27, 1998.

The Complaint, as amended at the hearing, alleges that Waste Management of Palm Beach, the Respondent or the Company, violated Sections 8(a)(1) and (3) of the National Labor Relations Act, also known as the Act.

The Complaint is joined by the answer filed by Respondent on April 13, 1998, as amended at the hearing, wherein it denies the commission of any unfair labor practices, and raises certain affirmative defenses alleging, essentially, that any actions it took were legitimate business related actions not in violation of the Act.

This Bench Decision is being issued pursuant to Section

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102.35(a)(1) of the Board's rules and regulations, upon the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of their testimony, and exhibits received in evidence, and the Trial Memorandums of Law, and contentions of the parties.

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tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Findings of fact and conclusions of law.

1. Jurisdiction.

A. The business of Respondent.

The Respondent is a Florida corporation with an office and place of business located in Boynton Beach, Florida, herein called the Respondent's facility, where it has been engaged in the business of solid waste collection and disposal.

During the past twelve months prior to the filing of the Complaint, the Respondent, in conducting its business operations, purchased and received at its facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Florida.

At all material times, Respondent has been an Employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

B. The labor organization.

The Union has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

There are several Complaint allegations. And by way of background, in the late summer of 1997, a Union campaign was

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commenced at the Respondent's facility. There was a letter sent to the Respondent by the Union advising of the Union campaign and naming members of the in-house committee.

On September the 8th, 1997, there was a petition for an election filed with the National Labor Relations Board, and on October 17th, 1997, the election was conducted.

Now, with respect to the unit description, there is a unit description, which was utilized in the election.

And that was: Included, all full-time and regular part-time employees classified as compact or maintenance worker, container maintenance worker, customer service rep, dispatcher, driver, helper, equipment operator, field technician, groundskeeper, lead container maintenance worker, load equipment operator, lead mechanic, mechanic, maintenance clerk, scalehouse operator, and welder, employed by the Employer at its main facility in Boynton Beach, and its recycling facility in Riviera Beach, Florida.

Excluded, all other employees, including temporary employees, guards and supervisors as defined in the Act.

Unfair labor practice charges were filed by the Union on the day preceding the scheduled election and, as a result, after the election, which took place on Friday, October 17th, the Region impounded the ballots, which ballots remain impounded to the present day.

The issues before me, relate solely to the Section 8(a)(1) and (3) charges alleged in the Complaint.

Paragraph 5a of the Complaint alleges that on or about August 28th, 1997, by Glen Mincey, a supervisor, Respondent promulgated, and since said date has maintained and enforced, a rule prohibiting employees from Union related solicitations and distributions at Respondent's facility.

Employee Croswell Gayle testified that he was soliciting on behalf of the Union on the company parking lot prior to the start of his shift at 6:00 a.m., and that supervisor, Glen Mincey, came to his area, approached him on August 28th and told him that if he was serious about forming a Union, he must take it outside of the compound.

Gayle told him he was not required by the law to do so, as he

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was able to solicit on a parking lot in a non work area.

At the time of the hearing, Gayle had resigned from his employment voluntarily for a position with another company. Gayle testified that he had been engaged in discussing the Union with other employees on the parking lot and asking them to sign a petition if they desired Union representation. He had earlier contacted the Union representative, who had sent him a packet concerning how to organize a Union at Respondent's facility. Gayle testified that he solicited during his non-working hours and during non working time, and that during the course of his employment, he had seen employees advertising items on the

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employee bulletin board, and trying to sell items during working hours. He further testified he had not previously been apprised of any policy prohibiting these activities before the Union organizing campaign began. I credit Gayle's testimony, which was unrebutted, as Mincey was not called to testify.

The General Counsel has cited *Stoddard-Quick Manufacturing Company*, 138 NLRB 615-21 (1962), for the proposition that employees may solicit on plant premises, subject only to the restriction that solicitation be during non working time. The General Counsel has also cited the Board holding that a rule directed solely against Union solicitation is generally invalid on its face, citing *Southwest Gas Corp*., 283 NLRB 543-46, 1987. The General Counsel contends that Gayle was soliciting signatures for the Union petition outside of working hours, and outside of the working area, and that there was no evidence to establish that the Respondent had any no solicitation policies prior to the advent of the Union campaign. I find that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining and enforcing this unlawful no solicitation rule.

Gayle also testified that on August 29, 1997, he and a fellow employee, Walt Williams, were distributing Union

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literature to employees on the parking lot prior to working hours once again. At that time, David Hesp, a supervisor, approached him and told Gayle and Williams that, "okay, guys, you can't hand that literature out there." Gayle testified he explained that they were in the parking lot. Hesp left and then came back and said, "okay, but you can't do it Monday morning." Gayle testified that this was a Saturday. I believe he subsequently testified that it was a Thursday. However that is not material to this particular finding. At this time, there was no policy against solicitation presented in this case. There was a bulletin board for notices and sale of property during working hours. I credit Gayle's testimony, which is unrebutted, as Hesp was not called to testify. I find that Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining and enforcing its no distribution policy and no solicitation policy, and by threatening its employees with removal from the facility if they failed to follow the rule.

With respect to Paragraphs 6a and 6b of the Complaint, this allegation, 6a, is that on or about August 28th, 1997, Respondent by Rick Boardman, who was the Safety Director at

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Respondent's facility, A, interrogated its employees regarding their Union membership, activities and sympathies, and, B, threatened its employees with loss of benefits if they selected the Union as their collective bargaining representative. Employee Herbert Eugene testified that the day after a Union meeting at John Prince Park, Boardman approached him while he was in his truck, and asked him if he had heard about the guys in the Union. Eugene told him "I was at the Union meeting last night." At that time, another employee approached and called the supervisor, and Boardman told Eugene that he would see him later.

Later that day, there was a safety meeting conducted by Boardman and after the safety meeting, Boardman asked Eugene what had happened at the Union meeting. Eugene told Boardman that the employees do not feel like they have job security, because management does not respond to them. Boardman said he understood this, but that you could lose your benefits and start from zero. Eugene testified further that prior to this date, he had never spoken to Boardman about the Union, nor had he told him that he was going to the Union meeting. I credit Eugene's testimony, which was unrebutted as Boardman was not called to testify.

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The General Counsel cites *Rossmore House*, 269 NLRB 1176-78 (1984) for the proposition that an unlawful interrogation under Section 8(a)(1) of the Act, occurs when under the totality of the circumstances, the questioning interferes with, restrains, or coerces employees in violation of Section 8(a)(1) of the Act. In that case, the Board said in making that determination, "the Board considers factors such as the kind of information sought, the identity of the questioner, and the method and place of interrogation," citing *Cumberland Farms*, 307 NLRB 1479-80, (1992).

In the instant case, Boardman approached Eugene on two occasions to discuss the Union. Boardman was inquiring about specific employees' Union activities, and not about Eugene's generalized Union sentiments. Accordingly, Boardman's questioning of Eugene was not a casual conversation, and Boardman seized on this opportunity to threaten Eugene with loss of benefits if the employees selected the Union, by telling him that he could lose benefits and start at zero if they had a Union. I find that under the totality of the circumstances here, the Respondent did unlawfully interrogate Eugene about his Union activities, in violation of Section 8(a)(1) of the Act. With respect to the threat that if the employees selected the Union, they could lose their benefits and start at zero, the Board has held that such statements violate

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Section 8(a)(1) of the Act, *Lear Siegler Management Service Corp*., 306 NLRB 393 (1992).

With respect to Paragraph 7 of the Complaint, the allegation is that on or about September and October 1997, more precise dates being unknown to the acting General Counsel, by Supervisor W. Scott Green and Semore Welch at Respondent's facility, the Respondent solicited employee complaints and grievances and impliedly promised employees increased benefits and improved terms and conditions of employment if they rejected the Union as their bargaining representative.

In this case, it is undisputed that Respondent conducted, in response to the Union campaign, a series of meetings, approximately four, commencing in the end of September, on or about September 24, 1997. These meetings were conducted by then Vice President of Human Resources, Kenneth P. Peterson, and Florida Human Resources Director, W. Scott Green, with Semore Welch, its Labor Relations Specialist, also in attendance. At the first meeting, Scott Green introduced Peterson, who had not been at this facility since 1993. On that date, approximately four meetings were held with various employees, and this continued throughout the series of meetings. Somewhere between four to six meetings were held on each day of four occasions when there were weekly meetings following

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thereafter, until the election. Attendance at the meetings was mandatory.

Employee Joseph Young testified that at the first meeting, Green and Peterson asked what the employees' concerns were, and various employees complained about reduction from three employees to two employees per truck, pay reductions and benefit cuts, and that Green and Patterson wrote the issues down on a large tablet on a tripod. He testified that Peterson and Green told the employees they had no idea these problems were going on, and told them that we can work this out.

Employee David Lee Garner testified that at the first meeting with Peterson, Green and Semore present that he attended, Green apologized to the employees for not being around the Division, and stated that he had no idea that they had problems so severe. Garner testified he had previously talked to Green about problems three months prior to this, and he thought that what Green was saying was a lie, and said so at the meeting, as Green was supposed to have called him back, but did not. Green then told him he would like to speak to him later, but he said no, as he had previously failed to contact him. Green then introduced Peterson and the employees told him about the various complaints, such as supervisors telling them to hit the gate if they did not like various policies or did not want

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to make a change, and that Peterson assured them that this would not happen again. After various complaints, Peterson asked if the Union or change is what the employees wanted, as changes can be made if they would be given another chance. Mickel Pierre Gilles also testified with respect to these meetings.

As there were several meetings held to accommodate all the employees in their various shifts, various employees would be at a meeting with one co-worker on one occasion, and not with the same co-worker on the next occasion. The meetings generally lasted a half hour to an hour, and there were several meetings on each of the four days that the Respondent conducted the weekly meetings, commencing in late September.

Scott Green testified that he opened the initial meeting and told the employees that they had received the Union petition, and that there would be an election. He testified that at that point, the meetings became "wild" as employees were upset as the company was not addressing their concerns. The employees started to talk about issues. Employees commented that management was not writing the issues down, and so they did write them down on a flip chart. He then turned the meeting over to Peterson. After he wrote the items down, he told them that they

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could deal with illegal or gross violations, but could not deal with company policy, change company policy at this point in time.

Green testified that at the second meeting the following week, a video was shown and informed the employees about information about the campaign and negotiations, and that employees were constantly bringing up individual and group concerns at this meeting. Green testified that at the third or fourth meeting, Peterson spoke, as he did at all the other meetings, and that he had never heard Peterson make any statement with respect to negotiations beginning at ground zero. Green attended most of the meetings, but not all of the meetings. He testified that a 401(K) plan was in effect at the time of the campaign, and he was involved in administering the 401(K), and there were several changes. In 1994 to 1995, the matching contribution of the company had been enhanced, and it was to be enhanced once again on January of 1998. He testified he was first aware of the change in the 1998 401(K) plan in the late spring of 1997. It was approved by the Board of Directors in the summer of 1997. He testified that the company had a television station, WMX-TV, which was subsequently changed to WMTV, on which information was sent to managers, which they could watch.

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He did not know who had watched it at the Palm Beach facility. However, this program was not targeted for individual employees.

Green also attended a benefits dinner and was Master of Ceremonies, and introduced various company officials who were there. He gave a benefits presentation, and afterwards, Peterson explained information on retirement benefits. Green testified that at that meeting, nothing was said about the Union. The meeting was a social function to which the employees' spouses were invited, as well as the employees.

Green testified he could not recall what happened at the fourth meeting held by the Respondent with the employees during the day prior to the election. He did testify regarding an issue that had come up with respect to fines for accidents.

Ken Peterson, who is now the Director of Labor Relations for the south area, testified that he was contacted by Scott Green, then Division of Human Resources head for the Florida area, and was informed by him about the Union campaign. Prior to the petition that was filed, he had no knowledge of the Union activity. He testified also that there were four to five meetings conducted on the first day, commencing September 24th, and the following weeks. He testified it was approximately five meetings, and the dinner meeting was held on October 15th. He testified that at

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the first meeting, he apologized to employees for not knowing about their problems, and for their need to go outside of their own management. He tried to write down the problems as the employees were venting. He told the employees that he couldn't do anything about the pay. He testified that he never said bring in your problems and we will fix them, or anything similar in that respect. He testified that he and Green and Welch were handling these meetings, and that local manager Cherry was not involved in the meetings. The meetings were mandatory, but no penalties were given to anyone for not at-

tending the meetings. He testified that at the first, second and third meetings, they used overheads to explain the company's position. At the first meeting, a survey taken by the company at various locations prior to this was mentioned. He told them about a Union campaign and what it involved for the employees with the upcoming election. He testified that he discussed contract negotiations in the third meeting, and explained to the employees that they could end up with more, less or stay the same.

And he also testified that although the company had both Union locations and other locations where the employees were not in a Union, that there were no contracts negotiated with a union where the employees had retained the 401(K) plan.

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In no case had they ended up with the 401(K) plan in a contract. He acknowledged there may have been some Union pensions involved.

Peterson testified he never said that negotiations would start at zero or ground zero. He gave examples of negotiating 401(K)s for a closed shop as something that a Union might be willing to give up in order to obtain the closed shop. The only handout he presented was a handout saying to get it in writing, with respect to Union promises being made during the course of the Union campaign.

Green testified that at the social dinner, the company did almost one hundred percent of the talking. There was very little questioning going on, and that they engaged in no talk about the Union. In fact, he may have made some statement to the effect that he was not going to talk about the Union. He did announce changes with respect to the enhancement of the 401(K) plan, which was to occur on January 9th, 1998. With respect to this enhancement, he testified that although the meeting was on October 14th, there was an announcement being made or information being made, sent to the various Divisions on or about October 15th. The election was scheduled for October 17th. He denied ever having said that the 401(K) plan was not negotiable. He acknowledged that he had no order to dispense information on

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October 14th, 1997, with respect to the enhancement of the 401(K) plan, although this was three days before the October 17th election.

There was testimony presented by various witnesses brought forth by the Respondent in this case, that they had not heard the solicitation of complaints or grievances during the course of the meetings that they went to. However, I find that the testimony of David Garner, Joe Young, and Mickel Pierre Gilles should be credited in this regard. By doing this, by soliciting employee grievances and impliedly promising to remedy them if the employees rejected the Union, the Respondent violated Section 8(a)(1) of the Act.

Now, it may be that Mr. Peterson did not start out to do this, and it may be that he felt overwhelmed and/or Mr. Green by the vigor of the employees' grievances, as they were presenting them at the meeting, and felt compelled to answer them, and to remedy them if he could do so. But I find that, by being placed in this position and responding to the complaints the Respondent did violate Section 8(a)(1) of the Act.

The Board holds that Employers cannot solicit employee grievances and impliedly promise to remedy these grievances, if employees refrain from engaging in Union activities, *Reno*

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Hilton, 319 NLRB 1154–69 (1995), and *Chef's Pantry, Inc.*, 247 NLRB 77, 80–81 (1980).

There was no evidence, presented with respect to any solicitation of employee grievances by Semore Welch.

With respect to Paragraphs 8a and 8b, I find General Counsel has failed to make a prima facie case with respect to threats with respect to loss of the 401(K) plan. I found the testimony of Garner, Young and Gilles, while explicit, may have been, and it appeared to me, might very well have been the result of their take on just what they were hearing at these meetings. I find that the evidence is insufficient to sustain a violation with respect to Peterson having threatened that the employees would lose their 401(K) plan if they went Union. I think that his testimony was consistent, that he explained the possibilities of bargaining and the negotiation process back and forth. And I find thus no violation with respect to Paragraphs 8 and 8b.

With respect to Paragraph 8c of the Complaint, I do find that Peterson's announcement that as of January 1, 1998 the Respondent would increase its matching contribution to the 401(K) plan, and by the hosting of the food and drink benefits dinner, at which time Peterson made the same announcement three days prior to the election, was violative of Section 8(a)(1) of

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the Act, *Reno Hilton*, as cited previously, at Pages 1154-55; *Capital EMI Music*, 311 NLRB 997, 1012 (1993).

As the General Counsel alleges, I find that, although the enhancement of the 401(K) may have been pending, it had not been announced at other facilities, and Mr. Peterson was under no compulsion or order to do so. I can conceive of only one reason for doing so, and the obvious effect of that was to enhance the Employer's position with respect to the Union campaign. I conceive of no other reason for having brought together this social food and drink meeting two days prior to the election *Beasley Energy, Inc.*, 228 NLRB 93 (1977), and I find under both items the Respondent violated Section 8(a)(1) of the Act. And that was, I find that the Respondent violated Section 8(a)(1) of the Act by unlawfully promising employees an increased matching contribution to their 401(K) plan effective January 1 of 1998.

With respect to Paragraphs 8a, 8f, 11a and 11b of the Complaint, this has to do with penalties that certain drivers, approximately seven, had received in 1995 as a result of a policy engaged in by local management at this facility, but not elsewhere within the company, whereby drivers were penalized the sum of $200 and perhaps more, for traffic accidents they incurred while on the job.

This was brought to Peterson's and Green's attention at

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the meetings held in September and October of 1997. David Garner and Joe Young testified concerning this. Peterson testified that he responded to the employees by acknowledging that he believed the rule was wrong, and that employees would receive refunds for the penalties. Green testified that he thought the rule was either illegal or grossly in violation of company policy.

The Respondent did subsequently remedy this complaint by refunding the penalties to the drivers shortly before the election. Now, Respondent argues that it did not utilize this as a

campaign tool, and publicize it otherwise. However, I find that by doing so–by promising to remedy it, Respondent violated Section 8(a)(1) of the Act. And by actually doing so, it violated Section 8(a)(3) and (1) of the Act. I can conceive of no legitimate business purpose for doing this prior to the upcoming election.

With respect to Paragraphs 4b, 9a and 9b of the Complaint, employee Joe Young testified that on the Friday prior to the election, Terrie Peet, a dispatcher, gave employees their paychecks and that as the employees received their paychecks, she also gave them a brochure explaining their benefits, and told them that if they selected the Union, they would lose these benefits. At that time, Floyd Cherry, then the General Manager of

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the facility, walked into the room and Peet told Cherry that they should do "real good" in the election, because she was telling employees that they could lose benefits if the Union was selected. Young testified that Cherry did not respond to this verbally, but did smile at Peet.

With respect to Peet's particular position, there was ample testimony that she is a dispatcher, she has no supervisory responsibilities, and that she often hands out paychecks and other handouts as required.

Cherry testified that he may have recalled the incident. In fact, when faced with his affidavit, he acknowledged that he had, in fact, recalled this incident, but did not recall who had been the one to talk to him.

I find that the evidence presented here is insufficient to sustain a violation of the Act with respect to this allegation.

While I credit the statement of Joe Young, the statement attributed to Peet by him that they would do real good in the election because she was telling employees that they would lose benefits if the Union was selected, is simply insufficient to prove a violation of the Act.

There is no showing that Cherry did anything other than walk in normally, as he routinely did during a particular day, or that he had any knowledge of what was going on prior to this time or that any other member of management had

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directed Peet to make these comments. Moreover, Peet's comments are certainly capable of different interpretations as she was, in fact, a unit employee, entitled to vote in the election, and it is clear that she could have very well been making these comments on her own. I do not find that Cherry's smiling at this statement by Peet was an acknowledgment such as to condone her conduct of any unlawful threat to the employees on behalf of management. I therefore find that there is no violation of the Act. I find she's not a supervisor. I find that she was not the Employer's agent with respect to these comments.

With respect to the sponsoring and hosting of the social function, that's Paragraphs 10a, 10b, and 10c of the Complaint, I find that it was a violation of Section 8(a)(1) of the Act, and I cite *Beasley Energy, Inc*., 228 NLRB 93 (1997).

And with respect to the other Waste Management facilities and unfair labor practice conduct cited me by the General Counsel, I do not find it determinative of this case.

All right. After the close of the record in this case, I will receive the transcript in ten days, and I will review the transcript and review my decision, which will not become final until such time as I enter it in final form.

At that time, I will also file formal conclusions of law. I will recommend the remedy, enter an order, and attach a notice with respect to

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this.

Now, I may very well modify this Bench Decision, not in any substantial particulars, but if I need to cite an additional case and grammatical errors will be corrected.

Exceptions will not begin to run until such time as I file the formal decision in this case.

Is there anything further before I close the case?

MR. SULLENBERGER: No, sir.

MS. KUCERA: No.

MR. SULLENBERGER: No.

JUDGE CULLEN: All right. The case is now closed.

(Whereupon, at 2:20 p.m., the record in the above-entitled matter was closed.)